

From: Isenberg, Phil@DeltaCouncil
Sent: Thursday, February 23, 2012 5:13 PM
To: Hoppin, Charles@Waterboards
Cc: Rodriguez, Matthew; Jerry Meral
Subject: RE: Delta Flow Criteria

Charlie:

Thanks for your email. Yes, I am aware that various interest groups would prefer that our Delta Plan not mention the need for the Board to complete its ongoing process to establish new water quality flow standards for the Delta. They prefer the Council remain silent on the subject of flows, whether your efforts are water quality standards, or in exercise of your Public Trust or Article X, Section 2 obligations. I gather some of the same groups have asked the Board to immediately suspend any and all flow-related actions for the Bay-Delta. Some of the same interests have asked us to delay the Delta Plan (or at least exclude any discussion of flows) until they work out some 'deal' with BDCP.

1. We agree that your Flow Criteria report (2010) is not 'pre-decisional'. After all, the report was designed for '...informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan...' WC 85086 (c) (1), and the statute clearly says it is not pre-decisional. We have never said anything to the contrary.
2. Your Flow Criteria report was prepared "...to establish an accelerated process to determine instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan", WC 85086 (b), and "For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan...", WC 85086(c). Our Delta Plan is required to take actions and promote measures to achieve a healthy ecosystem, including those that "Restore Delta flows and channels to support a healthy estuary and other ecosystems" WC Sec. 85302 (e)(4). This explains why we have consistently supported the Board's long-standing effort to adopt new Delta water quality standards. As you know, we have deferred to the Board on what the precise flow standards should be.
3. In consultation with your staff, we developed our Water Resources Policy 1 (see 5th Draft Delta Plan, pp. 82-84). It adopted virtually all of the language they suggested, as well as your then-current timeline for action. The only enforceable aspect of that Policy is the provision that we will apply your current flow standards until you adopt new ones; and apply the new standards thereafter.
4. The Environmental Water Caucus has called on us to adopt an immediately 3 million acre feet reduction in water exported from the Delta, and we will review that request as we prepare our final EIR. Speaking only for myself, I find it hard to imagine that the Council would seek to set its own flows when the Board so clearly has this legal authority. It is worth noting, that if the critics of your Delta Flow process are successful in again delaying your new standards, it is likely the federal EPA may step in and act on their own. We do not consider that an acceptable alternative, but a likely result of all the political jockeying for leverage. In all honestly, the issue will have to

be resolved if there is a hope of achieving a BDCP solution, which the Council supports.

5. Finally, the language we use in our 5th Draft Delta Plan (see pp 84 and 85) discussing updated flow standards appears next in this message. It speaks for itself, and accurately reflects the nuanced view you outline of your balancing responsibilities. I have highlighted some language that directly addresses your email. See, also http://www.deltacouncil.ca.gov/sites/default/files/documents/files/Fifth_Staff_Draft_Delta_Plan_080211.pdf.

Update Delta Flow Requirements

California law grants the SWRCB considerable authority in the areas of water rights, water quality protection, and the setting of water flow criteria. The SWRCB also has the authority to enforce the Public Trust Doctrine and the provisions of the California Constitution in Article X, Section 2, which pertain to the reasonable and beneficial use of water.

As competition for California's water supply has intensified, the SWRCB has been at the center of political disputes over how its decisions on water flow requirements should be made. Often, the decisions needed to protect the State's interests in ecosystem protection and water supply reliability have been blocked by conflicts among competing interests. Consequently, the state has found itself in an increasingly unsustainable situation with native fish populations crashing and the reliability of water exports from the Delta watershed diminishing.

In order to achieve the coequal goals, it is essential that the SWRCB complete the work to develop, implement, and enforce new updated flow requirements for the Delta and the major tributary streams in the Delta watershed. Delta export reliability hinges on first establishing water quality requirements to protect native Delta fish and the determining Delta flows and water quality standards. The State cannot effectively plan, finance, and build new conveyance and storage facilities to improve the reliability of water exports from the Delta watershed when future Bay-Delta Water Quality Control Plan objectives and flow requirements are not known.

In setting enforceable flow requirements, the SWRCB is required to balance the public trust uses in the Delta with public trust values upstream of the Delta and with the larger public interests of the State of California. Therefore, in determining whether it is feasible to protect Delta public trust uses through implementation of flow objectives, the SWRCB must consider what is feasible and what level of protection is consistent with the broader public interest and the California Constitutional Reasonable Use Doctrine.

The SWRCB is currently in the midst of a phased process to review and amend—or to adopt new—flow requirements for the Delta and its high-priority tributaries. The SWRCB has set a work plan and schedule for developing flow standards for the Delta and its watershed. The first step was taken in 2008, when the SWRCB committed to a process to review and potentially modify the current Water Quality Control Plan for the Bay-Delta and its implementation through water rights and other actions (SWRCB 26 2008a). The SWRCB began that process in 2009 by

conducting a periodic review of the Bay-Delta Water Quality Control Plan to identify water quality issues that should be addressed through upcoming water quality control planning processes. The SWRCB is reviewing the San Joaquin River flow and southern Delta water quality objectives and the implementation program for those objectives, and plans to complete its review by June 2012. The current flow requirements established by the SWRCB in D1641 remain in effect until the SWRCB formally adopts and implements revised flow objectives.

The SWRCB is taking, or has recently taken, several other actions related to updating flow objectives for the Delta and its high-priority tributaries. In 2010, the SWRCB completed its report titled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (SWRCB 2010a). This report provides an assessment of the flows needed to protect the Delta and its ecological resources, but does not address other public trust considerations. While informing the broader flow-standard-setting process, the report also underscores the importance to California of resolving as soon as possible what those future flow regimes need to be. In addition, the SWRCB is coordinating with DWR in its preparation of environmental documentation for the Bay Delta Conservation Plan (BDCP) and may consider these environmental documents and other information developed for the BDCP in its proceedings to review flow requirements in the Delta.

Best.

Phil

Phil Isenberg, Chair
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From: Charles Hoppin [mailto:CHoppin@waterboards.ca.gov]
Sent: Wednesday, February 22, 2012 11:21 AM
To: Isenberg, Phil@DeltaCouncil
Cc: Rodriguez, Matthew; Jerry Meral
Subject: Delta Flow Criteria

February 22, 2012

Mr. Phil Isenberg
Chair, Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

Dear Chair Isenberg:

I understand that some of the comments that the Delta Stewardship Council has received on its draft Delta Plan rely on the State Water Board's 2010 report, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, in recommending the creation of a "more-natural flow regime." I am writing to reiterate caveats accompanying the report that limit the report's use in support of any particular numeric flow requirements.

The 2009 Delta Reform Act stated that the report would "inform planning decisions for the Delta Plan," but that it would not be "predecisional." The report, therefore, states that none of the determinations in the report have regulatory or adjudicatory effect. The report's flow criteria cannot be taken as establishing standards, instead, water quality objectives and water rights decisions informed by the report's flow criteria must ensure the reasonable protection of beneficial uses, which will entail balancing of competing beneficial uses of water, including municipal and industrial uses, agricultural uses, and other environmental uses. There are good reasons for both the State Water Board and the Council to recognize by these limitations. For example, the board's report was not required to evaluate how implementing new Delta flow criteria would impact streamflows previously implemented for salmon and steelhead in the Delta's tributaries or water temperatures in those tributaries. A great deal of work has been done to improve conditions for fish and wildlife, especially salmon and steelhead, in some tributaries and it would be counterproductive to undermine that work. These public trust considerations and other legal requirements will be crucial when the State Water Board does consider new regulatory objectives for the Delta streamflows.

When the board considers regulatory flow objectives, it also evaluates how their implementation could impact California's water supplies, as well as hydroelectric generation and public safety, including flood control. For example, the annual and seasonal variations in California's climate, water supplies, and hydroelectric generation impact storage, New Delta flow objectives could impact the ability to store water and, in turn, impact future hydroelectric generating capacity and water supplies. The Porter-

Cologne Water Quality Control Act requires the board to weigh such concerns in determining how to ensure “reasonable protection of beneficial uses,” just as the Delta Reform Act requires the Council to adopt a Delta Plan that “furthers the coequal goals.”

I appreciate the challenge before the Delta Stewardship Council. I encourage you to recognize the unique context in which the board prepared its Flow Criteria report and more importantly, all of the public trust values and beneficial uses that we will be required to evaluate with respect to any new Delta Flows.

Sincerely,

Original Signed by (attached)

Charlie Hoppin
Chairman

cc: Jerry Meral, Deputy Secretary
California Natural Resources
Agency

Matthew Rodriguez, Secretary
California Environmental
Protection Agency